



## WESTERN BUSINESS ROUNDTABLE

May 30, 2003

Ms. Marianne I Horinko SE 360  
Assistant Administrator for Solid Waste and Emergency Response  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**Re: RCRA Solid Waste Definition**

Dear Ms. Horinko:

I am writing on behalf of the Western Business Roundtable regarding the U.S. Environmental Protection Agency's ("EPA's") interpretation of its statutory authority and concomitant development of regulations and guidance in regards to defining the scope of what constitutes "solid waste" under the Resource Conservation and Recovery Act ("RCRA").

The Western Business Roundtable is a non-profit business trade association comprised of CEOs and senior executives of organizations doing business in the Western United States.

Our member companies are involved in a broad range of industries, including agricultural products, accounting, chemicals, construction and construction materials, conventional and renewable energy production, energy services, engineering, financial services, manufacturing, mining, oil and gas, pharmaceuticals, pipelines, telecommunications, utilities and others.

We work for a common sense, balanced approach to economic development and environmental protection. We support public policies that encourage economic growth, opportunity and freedom of enterprise. We are proud defenders of the Western way of life.

### **Background**

In a 1998 rulemaking (referred to as the "Phase IV Land Disposal Restriction rule"), EPA asserted jurisdiction under RCRA over certain "recycled" mineral processing secondary materials. 63 Fed. Reg. 28,556 (May 26, 1998). Under the 1998 final rule, EPA regulated these recycled materials as "solid wastes," unless the materials satisfied the regulatory terms of a conditional exclusion. The materials at issue were recycled mineral processing sludges, by-products, and spent materials that exhibited a hazardous characteristic. The conditions of the exclusion were that such materials, among other things, must not be stored on the land prior to recycling. In a legal challenge to the final rule, the U.S. Court of Appeals for the District of Columbia Circuit vacated the portion of the Agency's rule that conditionally subjected these recycled materials to regulation as "solid wastes." *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) ("ABR decision"). The basis for the Court's decision was that EPA's conditional exclusion improperly regulated materials generated and recycled within the mineral processing industry as "discarded materials" subject to RCRA regulation as "solid wastes." Contrary to

EPA's position, the Court found that these materials were "destined for reuse in an on-going industry process." 208 F.3d at 1053. The Court firmly rejected the Agency's notion that materials become RCRA "solid wastes" whenever they leave the production process and are stored for any length of time prior to being recycled.

### **EPA Response to ABR Decision**

In response to the Court's decision, the Agency promulgated a final rule wherein the Agency removed the conditional exclusion as it applied to recycled mineral processing "sludges" and "by-products." 67 Fed. Reg. 11,251 (March 13, 2002). The conditional exclusion still applies to recycled mineral processing "spent materials." In addition, EPA announced an upcoming rulemaking "to further the goal of encouraging legitimate recycling while protecting human health and the environment."

Prior to the *ABR* decision, EPA broadly asserted waste-management jurisdiction under RCRA over secondary materials that were generated during the production of a product or a co-product and routinely recycled. As articulated in 1985 when EPA promulgated its most recent definition of "solid waste," this jurisdictional determination was based on EPA's notion that "hazardous secondary materials being recycled are wastes, and that we ordinarily have jurisdiction to regulate most recycling activities involving these materials." 50 Fed. Reg. 615, 617 (Jan. 4, 1985). The *ABR* decision, consistent with earlier court decisions, makes clear that EPA's jurisdiction over such recyclable materials is restricted to materials that are truly "discarded," defined by the Court as materials that are "abandoned, disposed of, or thrown away." 40 C.F.R. § 261.2(a)(2).

### **Recommendations**

In its upcoming rulemaking, EPA must adhere to this jurisdictional restriction. We encourage the agency to ensure compliance with the requirements of the *ABR* decision, which may best be accomplished by EPA adopting the following positions:

#### **1. EPA Should Explicitly Recognize the Authority of Authorized States**

EPA should explicitly recognize that states with authorized RCRA programs are free to adopt written policies regarding the management of all recycled materials that are consistent with the Court's *ABR* decision. Under RCRA § 3006, states may apply to EPA to administer and enforce the solid/hazardous waste program. 42 U.S.C. § 6926(b). Once approved, the state's program operates "in lieu of the Federal program" with respect to those elements of the state's program that are approved by EPA. Thus, states with EPA-approved solid/hazardous programs should be able to define "solid wastes" in a manner consistent with the *ABR* decision without fear of EPA second-guessing state determinations.

#### **2. EPA Should Not Consider Storage Prior to Use as a Factor in Making a Solid Waste Determination**

When determining whether a recyclable material is being "discarded," EPA should not consider whether the material is stored prior to its use, reuse or recycling. In the Phase IV Land Disposal Restriction rule, EPA adopted an "immediate reuse" test to determine whether or not a mineral processing secondary material was being "discarded" and, therefore, subject to the Agency's jurisdiction as a "solid waste." 63 Fed. Reg. at 28,580. Under this EPA test, a recycled material

was deemed "discarded" if there was any storage prior to use/reuse and that storage was in any land-based unit (including state-approved lined facilities). According to EPA, recycled secondary materials being stored on the land or in state-approved lined facilities were considered "part of the waste disposal problem" that Congress sought to protect against when enacting RCRA. 63 Fed. Reg. at 28,580-581.

In the *ABR* decision, the Court rejected EPA's contention that incidental storage of a recycled secondary material subjected the material (unless otherwise excluded) to the "solid waste" program. As noted by the Court, "[t]o say that when something is saved it is thrown away is an extraordinary distortion of the English language." 208 F.3d at 1053. Incidental storage of materials prior to legitimate use/reuse is often necessary due to production demands or other factors beyond the control of the facility. The temporary storage of recyclable materials does not in any way diminish the status of the material as a beneficial ingredient, feedstock, or raw material. As such, temporary storage of valuable materials prior to use/reuse does not amount to "discard."

Also, EPA should not consider land storage prior to use/reuse as somehow factoring into a determination of whether a material is being "discarded." EPA's Phase IV Land Disposal Restriction rule was premised on the false notion that secondary materials are "solid wastes" when stored on the ground prior to being recycled. The Court in *ABR* rejected EPA's conclusion finding that, without regard for the method of incidental storage, materials "destined for reuse as part of a continuous industrial process [are] not abandoned or thrown away." 208 F.3d at 1056. The relevant issue is not the method of storage, but whether the materials are being legitimately recycled.

3. **EPA Should Recognize the Applicability of the *ABR* Decision to Recycled Mineral and Non-Mineral Processing Materials**

Although the *ABR* decision addressed mineral processing materials, the analysis provided by the Court of what is meant by "discard" is relevant to materials generated by any industry. Thus, EPA should recognize the applicability of the *ABR* decision to recycled mineral and non-mineral processing material.

The *ABR* decision addressed a broad and fundamental issue – EPA's RCRA jurisdiction. The Court's holding that EPA may only regulate materials that are truly "discarded" and that temporary storage prior to use/reuse does not amount to "discard" applies to non-mineral processing materials. No meaningful distinction may be drawn between storage prior to use/reuse at a mineral processing site and storage prior to use/reuse at a non-mineral processing site. Although confronted with a jurisdictional challenge in the context of mineral processing materials, the Court's broader conclusion is clear:

To say that when something is saved it is thrown away is an extraordinary distortion of the English language. Yet that is where EPA's definition leads. (208 F.3d at 1053). Thus, storage of materials generated at a non-mineral processing site prior to use/reuse of that material is not "discard" for the same reasons as articulated by the Court for recycled mineral processing materials

4. **EPA Should Not Rely on the Word "Continuous" to Narrowly Interpret the ABR Decision**

In its response to the *ABR* decision, EPA states that its rulemaking will solicit comment on how to "distinguish materials that are discarded from materials that remain in use in a continuous industrial process and anticipate[s] proposing a definition of 'continuous industrial process.'" 67 Fed. Reg. at 11,252.

In the *ABR* decision, the Court stated, with regard to the validity of the Phase IV Land Disposal Restriction rule's regulation of mineral processing secondary materials, that "all we can say with certainty is that at least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." 208 F.3d at 1016. In fashioning its response to the *ABR* decision, it appears that EPA is relying upon this single phrase from the Court's lengthy decision to guide its deliberations.

A "continuous industrial process" should be broadly viewed to include all necessary ongoing production steps where materials remain "in use" consistent with the *ABR* decision. Consistent with the *ABR* decision, "continuous" also should encompass storage of materials prior to their use/reuse at a site.

Further, "continuous" should encompass the generation of recyclable materials at one processing site and the use of these materials at another site, with or without interim storage. Frequently, processing sites will ship recyclable materials from one location to another for processing to produce other valuable products. The legitimate use/reuse at one site of materials generated at another site constitutes a direct reuse that is exempt from RCRA regulation.

5. **EPA Should Adopt a "Reuse" Test to Determine Legitimate Recycling**

Under RCRA, EPA must encourage legitimate recycling, while protecting public health and the environment. To that end, EPA should adopt a legitimacy test for use/reuse of materials based on the quantity of material used/reused in a calendar year.

Significantly, the Court in the *ABR* decision placed no limit on how long a material may be stored and still qualify as being used/reused. According to the decision, a material is not a "solid waste" as long as it is "destined" or "retained" for use/reuse. However, when a material is held indefinitely for some future recycling, it becomes increasingly difficult to support the contention that it will actually be used/reused and, therefore, is not being discarded. Therefore, it is appropriate to establish some time period that could be used as a "reasonable man" test of whether a material is truly "destined" or "retained" for use/reuse. In this context, material should be presumed to be directly used/reused if at least 75 percent by weight or volume of the amount of the material accumulated on the first day of January of a year has been recycled by the first day of January of the following year.

Although this time frame provides a basic standard, retention of a material for a longer period would not necessarily result in the material being destined for discard and, therefore, considered a "solid waste." A facility must have the opportunity to demonstrate that a longer storage period is appropriate and that there is still a reasonable expectation of use/reuse. This demonstration would consider such factors as the value of the material (including historic fluctuations in commodity values), the operational status of the facility and its production units, and other

circumstances that affect the facility's ability to reuse the material in an economically and technically practicable manner.

Although this suggested approach is similar to EPA's prohibition of "speculative accumulation" as defined at 40 C.F.R. § 261.1(c)(8), it would be applied to materials which are not "solid wastes" and, therefore, are not subject to solid or hazardous waste regulation. This concept is proposed as a reasonable approach to implementing the Court's decision that did not place any time frame on direct use/reuse.

6. **EPA Should Affirm the Continued Applicability of Other Exclusions**

In its rulemaking, EPA should recognize the continued viability of existing exclusions from the definition of "solid waste" for materials that remain "solid wastes" after the *ABR* decision. This would include, for example, mineral processing materials that are not directly used/reused in an ongoing production process.

The existing regulatory definition of "solid waste" contains a series of exclusions in 40 C.F.R. § 261.2(e). For example, Section 261.2(e)(1)(ii) excludes from the definition of "solid waste" sludges, by-products and spent materials (i.e., secondary materials) that are "used or reuse as effective substitutes for commercial products." The placement on the land of a secondary material for "reclamation" or as a substitute reagent does not constitute disposal if that is the ordinary manner of use of the raw material and EPA should recognize such in its rulemaking.

7. **EPA Should Recognize that Mineral Processing Materials Are Not Subject to the Test Articulated at 40 C.F.R. § 261.4(b)(7)(iii)**

EPA should recognize in the upcoming rulemaking that mineral processing materials used/reused within the mineral processing industry are not "secondary materials" for purposes of the test articulated at 40 C.F.R. § 261.4(b)(7)(iii). Under Section 261.4(b)(7)(iii), residues derived from the coprocessing of mineral processing secondary materials with normal beneficiation raw materials are not subject to regulation as "solid wastes" so long as the owner/operator (1) processes "at least 50 percent by weight normal beneficiation raw materials"; and (2) the secondary mineral processing materials are legitimately reclaimed.

Because the Court in *ABR* held that mineral processing materials remaining in the production process are never "discarded", they are not RCRA "solid wastes" or secondary materials. Thus, Section 261.4(b)(7)(iii) should not apply at all to the use of these recycled materials as feedstock.

We respectfully request your serious consideration of these comments. Thank you very much.

Sincerely,

A handwritten signature in dark ink, appearing to read "David Kimball", with a stylized flourish at the end.

David Kimball  
Chair  
Roundtable Waste Management Committee

Cc: Ingrid Rosencrantz, Office of Solid Waste  
U.S. Environmental Protection Agency  
John D. Graham, Administrator OIRA  
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Paul Noe, OIRA  
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